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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1979

**No. 79-88**

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Petitioner,*

vs.

JOHN MICHAEL WHYTE,
*Respondent.*

**On Petition for Writ of Certiorari to the Court of Appeal, First Appellate District, State of California**

## PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### PRELIMINARY STATEMENT

On July 19, 1979, petitioner filed a Petition for Writ of Certiorari to review the judgment of the California Court of Appeal. On October 10, 1979, the Court invited the views of the Solicitor General. On January 7, 1980, the Brief for the United States as Amicus Curiae was filed.

The instant Reply, in response to the Brief for the United States, is filed pursuant to Rules 24 (5) and 41 (5) of the Rules of the Supreme Court of the United States.

## ARGUMENT

### CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERRONEOUS OPINION OF THE CALIFORNIA COURT OF APPEAL AS THAT DECISION HAS A SIGNIFICANT IMPACT ON STATE PROSECUTIONS INVOLVING CUSTOMS SEACHES AND SEIZURES

Petitioner submits that Amicus Curiae misunderstands the impact of the California Court of Appeal decision. In its brief, Amicus agrees that the decision was erroneous and that the court misapplied Fourth Amendment doctrine (A.C. 9-10). However, Amicus concludes that plenary review by this Court is not necessary because the decision would not have an adverse impact upon Customs' operations. Why? Because, Amicus informs us, they "perceive neither a legal nor a moral obligation" for Customs to follow the law as set out by the Court of Appeal decision (A.C. 9). They ascribe little practical importance to the decision (A.C. 9).

Amicus is mistaken in this assessment.

The decision is binding on all courts in the First Appellate District of the State of California and persuasive authority in the remainder of the state. *Auto Equity Sales, Inc. v. Superior Court* 57 Cal.2d 450, 455-456, 20 Cal.Rptr. 321, 369 P.2d 937 (1962).

The First Appellate District of the State of California reaches from the Oregon border down the coast to San Luis Obispo County, a distance of over 500 miles. This jurisdictional district is co-extensive in area with that of the Federal Court for the Northern District of California. This coastline area includes numerous bays, coves and



inlets used as docking sites by a multi-million dollar import-export shipping industry. The jurisdictional area also includes San Francisco International Airport, the fifth largest in the United States.

The San Francisco region of United States Customs includes all of this area. In the fiscal year from October, 1978, to September, 1979, United States Customs, in the San Francisco and Northern California area, made 830 arrests and 9,315 seizures of contraband and items imported from abroad.[1] Of these, 2,742 seizures were of narcotics (heroin, cocaine, hashish, marijuana, opium, morphine and other drugs).

The Drug Enforcement Administration informs us that during that same fiscal period there were only 27 of these cases referred for prosecution to the United States Department of Justice.[2] What, it may be asked, happened to the remainder of the cases? According to DEA and Customs, they were referred to the counties of the First Appellate District for prosecution.

The pass off of cases to the state has taken place because both the Federal District Court for the Northern District and the United States Court of Appeals for the Ninth Circuit are suffering from the effects of a tremendous caseload increase. According to the Clerk of the Court

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[1]The extent of Customs operations in this region can be seen from the fact that they have over 200 agents and 500-600 inspectors (with full arrest and search powers) involved in the enforcement of Customs law. These figures do not include Drug Enforcement Administration agents. (Information supplied to our office from United States Customs, San Francisco, January 14, 1980.)

[2]Information from the Drug Enforcement Administration, Los Angeles, January 14, 1980.

for the Northern District, there were 4,452 cases filed last year. The Court had only 14 judges. Moreover, under the Federal Speedy Trial Act, all criminal cases must be heard within a limited time, a factor which undoubtedly also influences the selection of cases. As of November, 1979, the Ninth Circuit had a backlog of *4,000* cases. According to Chief Judge Browning, filings in the Ninth Circuit are increasing at a rate of six percent each year.[3]

If certiorari is not granted, an erroneous interpretation of the Fourth Amendment will remain on the books as binding precedent in a district where the importation of contraband is significant. Customs informs us that over twenty-five percent of all heroin imported into the United States is interdicted in the San Francisco region. All controlled delivery cases sent to the state for prosecution will remain subject to the requirements of this erroneous appellate decision. If Customs does not change their policies regarding controlled deliveries in this district, prosecution of these cases will be impossible. This amounts to a gigantic loophole through which importers of contraband will surely slip. If Customs does see fit to follow California law, as either a legal or moral obligation, there will be, for the first time in the history of Customs, a warrant requirement for their searches and seizures. What is to prevent appellate courts in any of fifty other jurisdictions from imposing similar requirements? Instead of a uniform national policy regarding Customs' activity, there will be a bewildering array of rules and requirements for each jurisdiction. Surely this is a result to be avoided.

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[3]Information from the State of the Circuit Address by Chief Judge James Browning before the Federal Bar Association, San Francisco, November, 1979.



Summary reversal is inappropriate in this case. This is so because the Court of Appeal decision, contrary to all rules of appellate procedure, is based on a Fourth Amendment objection invented by the court.[4] There was no specific objection on this basis at the suppression hearing nor did the trial court's ruling rest on these grounds. (See RT 66-75, Cl.Tr. 8-11, Cl.Tr. 33). The specific objection and ruling in the lower court was based on *United States v. Chadwick* 433 U.S. 1 (1978). If this Court were to reverse summarily, the case would be remanded to the state court which would suppress evidence of the contraband on the basis of *Chadwick*. Thus, the issue of whether *Chadwick* imposes a warrant requirement under the circumstances of this case must also be resolved. This case arose in 1977. There is simply no sense in summarily returning the matter to the lower court in 1980 for identical proceedings and an identical result. In the interests of judicial economy and efficiency, the issues should be resolved.

Finally, it appears that Amicus is mistaken on yet another matter. They "perceive no substantial or controversial Fourth Amendment issue" in this case (A.C. 10). They are incorrect.

This is a case of first impression. No lower court has ever attempted to impose a warrant requirement on Customs' activity. Moreover, the question of what geographical limits, if any, there are to border searches is also before this Court for the first time in this case. In *United States v. Ramsey* 431 U.S. 606, n.11 at 615 (1977), the Court specifically reserved this question.

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[4]California procedure requires a timely and specific objection. The failure to so object is deemed a waiver on appeal. See *People v. Rogers* 21 Cal.3d at 548-549, 146 Cal.Rptr. 732, 579 P.2d 1048 (1978).

## CONCLUSION

The search and seizure of the imported bales was a proper search by Customs agents. The subsequent controlled delivery was a proper and accepted practice by authorized Customs and DEA agents. Recovery was proper, without a warrant, at any time while the contraband was in transit to the ultimate consignee. The movement of the contraband by a third party intermeddler from a sidewalk into a business open to the public did not give any individual a Fourth Amendment expectation of privacy in the contraband. There is no deterrent value in exclusion of the evidence as there was no illegal police conduct.

Because of the far reaching impact the erroneous Court of Appeal decision has on the authority and conduct of federal agents in their duties to search and seize imported articles, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Dated: January 18, 1980

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